

REMARKS

Reconsideration of this application, based on the following remarks, is respectfully requested.

Claims 1, 6 through 10, and 12 remain in this case.

The provisional double patenting rejections of claims 1 through 13 are noted. In response, Applicants submit a Terminal Disclaimer, executed by an attorney of record in this case, by way of which the terminal portion of any patent issuing from this application beyond the term of patents issuing from the cited pending applications is disclaimed. The necessary Statement Under 37 C.F.R. §3.73(b) is also enclosed.

In this regard, copending application S.N. 09/998,330 has now issued, as U.S. Patent No. 6,925,634. The Terminal Disclaimer filed with this paper refers to that issued patent, rather than to it as a pending application.

Applicants therefore respectfully submit that the double patenting rejections in this application are overcome by this Terminal Disclaimer.

The Examiner also objected to the Declaration in this application, on the grounds that the statement acknowledging the duty of disclosure refers to 37 C.F.R. §1.56(a) rather than to 37 C.F.R. §1.56 generally. A new Declaration is required by the Examiner.

Applicants respectfully traverse the objection to the Declaration, on the grounds that the Declaration as submitted satisfies, in substance, the requirements of the Rules of Practice.

Applicants do not dispute the Examiner's finding that the statement acknowledging the duty of disclosure refers to 37 C.F.R. §1.56(a) rather than to 37 C.F.R. §1.56 generally. It does.

However, Applicants submit that the Declaration, as signed and submitted and referring to §1.56(a) fully satisfies the requirements of the Rules of Practice. To determine whether this is the case, it is useful to determine what statements are present in the remainder of §1.56 that

Applicants allegedly did not acknowledge, and then determine whether the absence of an acknowledgement of such statements, if any, materially changes the nature of the Declaration from that required and that to which Applicants expressly referred in the Declaration as signed and submitted.

As is well known by all involved in the practice of patent prosecution and examination, 37 C.F.R. §1.56(a)¹ outlines the nature of the duty of candor and disclosure in the prosecution of a patent application before the Patent and Trademark Office. That duty, as indicated in this subsection (a), extends to information that is "material to the patentability" of any claim pending in the application.² As mentioned above, Applicants each expressly referred to this subsection (a) in their Declaration.

Subsection (b) of 37 C.F.R. §1.56 defines what is, and what is not, information that is material to patentability. But it presents no additional duties of candor on a patent applicant, attorney, or agent. It is merely definitional, and explanatory, of the term "material" that is expressly included in subsection (a). Accordingly, an applicant who acknowledges the duty of subsection (a), but who fails to expressly acknowledge subsection (b), has failed to acknowledge nothing of substance. That applicant clearly acknowledges the duty of candor and disclosure relative to information that is material to the patentability of a claim in the pending application, and that applicant in no way has acknowledged less, by referring only to subsection (a) and not to subsection (b), than he or she would have by acknowledging both subsections.

Subsection (c) identifies those persons to whom the duty of candor and disclosure attaches, including, of course, the applicants themselves. Obviously, by signing the Declaration in the first place, the Applicants have acknowledged that they themselves are subject to the duty of candor and disclosure. As such, the failure to expressly acknowledge subsection (c), while expressly acknowledging subsection (a), is therefore a nullity.

¹ As amended effective September 8, 2000.

² 37 C.F.R. §1.56(a).

Subsection (d) states that the duty of candor and disclosure extends to intervening prior art in continuation-in-part applications. This application is not a continuation-in-part application. As such, the failure to expressly acknowledge subsection (d) has no effect in this application.

Accordingly, Applicants submit that the Declaration signed by Applicants and submitted in this application fully complies, in substance, with the requirements of the Rules of Practice. There is nothing of substance contained in any of subsections 37 C.F.R. §1.56(b) through (d) that is not acknowledged by the express acknowledgement of subsection 37 C.F.R. §1.56(a) made by Applicants in this application.

Applicants therefore respectfully submit that the Declaration filed in this application is substantively complete, and respectfully traverse the objection to that Declaration and the requirement for a new Declaration.

For these reasons, Applicants respectfully submit that all claims now in this case are in condition for allowance. Reconsideration of this application is therefore respectfully requested.

Respectfully submitted,



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CERTIFICATE OF FACSIMILE TRANSMISSION

37 C.F.R. 1.8

The undersigned hereby certifies that this correspondence is being facsimile transmitted to the Patent and Trademark Office (Fax Number 571-273-8300) on October 6, 2005.


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